

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 5538 IN THE) **PRELIMINARY ORDER**
NAME OF JACK OR MARGARET) Note: This order became final on 4-18-00
VERBREE) because no exceptions were filed.
_____)

FINDINGS OF FACT

Identification. No:	36-07534B
Source:	Groundwater
Priority:	April 8, 1975
Rate of diversion:	0.68 cubic feet per second ("cfs")
Volume:	136 AF per annum ("AFA")
Points of diversion:	NWSW and NWSE Section 23, T7S, R14E, B.M., Gooding County
Use:	Irrigation
Place of use:	34 acres within the SWSE Section 23, T7S, R14E, B.M., Gooding County
Conditions of approval:	The total combined rate of diversion of water right nos 36-07534A, 36-07534B and 36-02229 is limited to 4.38 cfs.

(Note: The "1/4" designations will be omitted from subsequent legal descriptions in this order).

Source: Groundwater
Priority: July 10, 1992

Rate of diversion: 0.27 cfs
Point of diversion: NWSW Section 25, T7S, R14E, B.M., Gooding County
Uses: Stockwater, commercial and domestic
Season of use: Year-round
Place of use: NWSW Section 25, T7S, R14E, B.M., Gooding County
Conditions of approval: 430 head of dairy cattle and 100 head of range cattle

The permit holder has submitted proof of beneficial use for the permit to the Department. The Department will conduct a field examination to determine the extent of beneficial use under terms of the permit.

3. On July 12, 1999, Jack Verbree and Margaret Verbree ("applicant") filed Application for Transfer No. **5538** ("application") with the Department seeking to change part of water right no. 36-07534B used for irrigation to stockwater and commercial uses in a dairy. The proposed rate of diversion is 0.30 cfs and the volume is 45 AFA. One new well is proposed for use within the NWSW Section 25, T7S, R14E, B.M. The place of use is within parts of Section 25, T7S, R14E, B.M. The applicant proposes to add 1187 dairy cows to an existing dairy herd of 463 cows at the site.

4. To make this water available, the applicant proposes to change the place of use of groundwater appurtenant to 15 irrigated acres located in the SWSE Section 23, T7S, R14E, B.M.

5. The Department published notice of the application which was subsequently protested by Lee Halper ("protestant").

6. On March 2, 2000, the Department conducted a hearing in the matter. The applicant was present and was represented by Robert E. Williams. Protestant Lee Halper represented himself.

7. Issues identified by the protestants are as follows:

- a. The proposed changes will injure other water rights.
- b. The proposed changes will constitute an enlargement in use of the original right.
- c. The proposed changes are not in the local public interest.
- d. The proposed changes are not consistent with the conservation of water resources within the state of Idaho.

8. Exhibits premarked, offered or accepted as a part of the record are as follows:

- a . Applicant's Exhibit 1 - Site Vicinity Map - Livestock Confinement Operations - Water Requirements and Consumptive Use Worksheet
- b. Applicant's Exhibit 2 - Livestock Confinement Operations - Water Requirements and Consumptive Use Worksheet
- c . Applicant's Exhibit 3 - Livestock Confinement Operations - Water Requirements and Consumptive Use Worksheet
- d . Applicant's Exhibit 4 - IDWR - Dairies: Water Use Worksheet
- e . Applicant's Exhibit 5 - Verbree Dairy Expansion - Analysis of Water Right Transfer to Dairy
- f. Applicant's Exhibit 6 - Verbree Dairy - Site Vicinity Plan
- g. Applicant's Exhibit 7 - Site Plan Map
- h. Applicant's Exhibit 8 - Letter dated June 29, 1999 to Verbree Dairy from Jenifer Beddoes and Preliminary Nutrient Management Plan
- i. Applicant's Exhibit 9 - NOT OFFERED
- j. Applicant's Exhibit 10 - Gooding County New CAFO Siting Permit
- k. Applicant's Exhibit 11 - Letters from Keith Soderquist, Sherman Young and Del Holyoak
- l. Applicant's Exhibit - 12 - Findings of Fact and Conclusions of Law of Gooding County Planning and Zoning Commission
- m. Applicant's Exhibit 13 - NOT OFFERED
- n. Applicant's Exhibit 14 - Well Interference Analysis - Verbree Dairy
- o. Applicant's Exhibit 15 - Large Vicinity Map - Verbree Dairy #2
- p. Protestant's Exhibit A - NOT ADMITTED
- q. Protestant's Exhibit B - Memorandum dated July 27, 1981 to Al Murray from Alex Schaefer, Letter dated March 13, 1990 to Governor Cecil Andrus from Richard P. Donovan, Letter dated March 28, 1990 to Lee J. Halper from Governor Cecil D. Andrus and letter to JFAC from Lee Halper

- r. Protestant's Exhibit C - NOT ADMITTED
- s. Protestant's Exhibit D1 - NOT ADMITTED
 - D2 - NRCS Nutrient Management - Code 90
 - D3 - NOT ADMITTED
- t. Protestant's Exhibit E - NOT ADMITTED
- u. Protestant's Exhibit F - NOT ADMITTED
- v. Protestant's Exhibit G - NOT ADMITTED
- w. Protestant's Exhibit H - NOT OFFERED
- x. Protestant's Exhibit I - NOT OFFERED
- y. Protestant's Exhibit J - NOT ADMITTED
- z. Protestant's Exhibit K - NOT OFFERED
- aa. Protestant's Exhibit L - NOT OFFERED

- ab. Protestant's Exhibit M - IDAPA 02.04.14 - Rules Governing Dairy Waste
- Notice of Temporary and Proposed Rule

- ac. Protestant's Exhibit N - NOT ADMITTED
- ad. Protestant's Exhibit O - NOT ADMITTED
- ae. Protestant's Exhibit P - NOT ADMITTED
- af. Protestant's Exhibit Q - NOT OFFERED
- ag. Protestant's Exhibit R - NOT OFFERED
- ah. Protestant's Exhibit S - NOT ADMITTED
- ai. Protestant's Exhibit T - NOT ADMITTED
- aj. Protestant's Exhibit U - NOT OFFERED
- ak. Protestant's Exhibit V - NOT OFFERED
- al. Protestant's Exhibit W - NOT OFFERED

9. Subsequent to the hearing, the hearing officer requested information from the applicant to show that the applicant was authorized to file the application. Notice of the request was provided to the protestant who objected to the augmentation but did not show adequate reason why the record should not be augmented. The hearing record is augmented with the following information:

- a. Certificate of Sale, recorded as Instrument No. 181475, Gooding County, Idaho, records
- b. Warranty Deed, recorded as Instrument No. 181564, Gooding County, Idaho, records
- c. Warranty Deed, recorded as Instrument No. 182436, Gooding County, Idaho, records

10. Gooding County has issued a New CAFO Siting Permit to the applicant for 1,650 animal units. (See Applicant's Exhibit 10).

11. The applicant presently purchases some of the feed for his existing dairy from local producers and plans to purchase feed from local producers for the enlarged dairy. The applicant also does a lot of business in the area. The enlarged dairy would require the hiring of 7 or 8 additional employees.

12. The design of the dairy provides for the scraping of alleys rather than flushing. The applicant recycles cooling water to the wash pen and to water troughs.

13. The Department of Agriculture has prepared a preliminary nutrient management plan for the dairy enlargement proposal of the applicant. (See Applicant's Exhibit 8). A final nutrient management plan is being prepared.

14. The rate of diversion, consumptive use and total volume of water diverted will not be larger after the transfer than before the transfer. (See Applicant's Exhibit 5).

15. Using an average annual pumping rate of 0.062 cfs, which is the continuous diversion rate to provide the required annual volume of water and a pumping period of 40 days, the estimated drawdown in a well 1/4 mile distant from the dairy wells is 0.02 feet. Using a maximum pumping rate of 0.30 cfs for 40 days, the estimated drawdown in a well 1/4 mile distant from the dairy wells is about 0.06 feet. (See Applicant's Exhibit 14).

16. A monitoring well located in Section 26, about a mile west of the dairy site showed a concentration of nitrate of 2.4 milligrams per liter ("mg/l") when measured in 1993. When remeasured in 1997, the concentration of nitrate had decreased to 0.662 mg/l.

17. The protestant lives approximately 15 or 20 miles away from the dairy site of the applicant.

18. The protestant is concerned that the existing statutes and rules and county requirements which govern the siting and operations of dairies is not sufficient to protect the quality of groundwater.

19. The protestant did not show that the changes proposed in the application will injure other water rights including his own, will enlarge the use of water under the right being transferred, is not in the local public interest or is not consistent with the conservation of water resources within the state of Idaho.

CONCLUSIONS OF LAW

1. Section 42-222, Idaho Code, provides in pertinent part as follows:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in

whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, and the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-203A(5), Idaho Code;

2. The applicant carries the burden of coming forward with evidence that the proposed change will not injure other water right holders, that it will not constitute an enlargement of the use and will be consistent with principles of conservation of the water of the state of Idaho.

3. Both the applicant and the protestant have the responsibility of coming forward with evidence regarding matters of public interest of which they are each most cognizant.

4. The applicant has the ultimate burden of persuasion for all of the criteria of Section 42-222, Idaho Code.

5. Observation well data show that low level nitrate impact has occurred to the groundwater in the general area of the applicant's dairy and that the nitrate level has decreased by 1.74 mg/l from 1993 to 1997.

6. The proposed changes will not injure other water rights.

7. The proposed changes do not constitute an enlargement in use of the original right.

8. The proposed changed uses of water are as efficient as other similar uses of water for irrigation and dairy uses within the area and are consistent with the local public interest and conservation of water resources within the state of Idaho.

9. The Department should approve the application with certain conditions.

ORDER

IT IS THEREFORE, hereby ORDERED that Application for Transfer No.5538 in the name of Jack and Margaret Verbree is **APPROVED** subject to the following conditions:

1. The right holder shall design and construct the dairy facility in a manner that it is capable of complying with the requirements of the Division of Environmental Quality of the Idaho Department of Health and Welfare and of the Idaho Department of Agriculture. Prior to diverting water under this approval, the right holder shall provide evidence to the Department that it has met compliance requirements.

2. The right holder shall measure and annually report to the Department the amount (cfs and AF) of water diverted under this transfer.
3. The place of commercial use authorized by this transfer includes land upon which wastewater may be applied for irrigation purposes to satisfy water quality requirements. Water diverted under this approval shall not be used for irrigation unless the water is first beneficially used in the dairy as authorized by this transfer.
4. Fifteen (15) acres located in the SWSE Section 23, T7S, R14E, B.M. are no longer authorized for irrigation with groundwater under the right being transferred.
5. The right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code.
6. Prior to use of water under this approval, the dairy operation shall comply with applicable county zoning ordinances.
7. The dairy facility is located in the NWSW Section 25, T7S, R14E, B.M.
8. The right holder shall accomplish the change authorized by this transfer within one (1) year of the date of this approval.
9. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.

Signed this 28th day of March, 2000.

--/S/--
L. GLEN SAXTON
Hearing Officer